

No. 21002 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD R. CLEMENTS, Trustee in Bankruptcy of the
Estate of Jesse E. Caton, dba CATON PRODUCTION
MACHINES,

Appellant,

vs.

PASADENA FINANCE COMPANY, a California corpora-
tion, *et al.*,

Appellee.

APPELLANT'S OPENING BRIEF.

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Jurisdictional Basis.

This is an appeal from a final judgment made and entered in the United States District Court for the Southern District of California, Central Division, and this appeal is prosecuted in accordance with the provisions of Rule 72 *et seq.* of the Federal Rules of Civil Procedure in the United States District Court.

On June 11, 1962, Jesse E. Caton doing business as Caton Production Machines filed a voluntary petition in bankruptcy.

On February 16, 1966, the Trustee in Bankruptcy, Appellant herein, filed a Complaint for Recovery of a Preferential Transfer. [Clk. Tr. p. 2.]

On March 24, 1966, Pasadena Finance Company, Appellee, filed a Notice of Motion and Motion to Dismiss And For Summary Judgment under Rules 12 and 56 of the F.R.C.P. [Clk. Tr. p. 6.]

On March 24, 1966, the Appellee filed in support of said Motion the Affidavits of Lyle A. Adrianse and W. M. Darnell. [Clk. Tr. pp. 12 and 38.]

On April 6, 1966, Appellant filed its Statement of Genuine Issues. [Clk. Tr. p. 43.]

On April 11, 1966 the Motion for Summary Judgment was heard before the Honorable William M. Byrne, Presiding Judge of the United States District Court. Judge Byrne ruled from the bench in favor of Appellees.

On April 11, 1966 Findings of Fact, Conclusion of Law and Summary Judgment of Dismissal was filed. [Clk. Tr. pp. 51 and 58.]

On April 12, 1966 the Summary Judgment of Dismissal was entered. [Clk. Tr. p. 58.]

On April 14, 1966 Notice of Signing and Filing of Judgment was filed. [Clk. Tr. p. 61.]

On April 20, 1966 Notice of Appeal was filed by Appellant, together with Statement of Points on Appeal. [Clk. Tr. pp. 63 and 64.]

Statement of the Case.

On August 20, 1964 at 10:00 A.M. the United States Machinery Company entered into a transaction with the bankrupt, Jesse Caton, doing business as Caton Production Machines, by which United States Machinery purported to buy from, and then immediately lease back to, the bankrupt, all of his machinery, equipment, vehicles and other assets. This transaction was

handled through an escrow at the First Western Bank. There was an attempt by both United States Machinery Company and the Bank to comply with the provisions of Section 3440(h) of the Civil Code of the State of California. However, the Notice of Intended Transfer and Lease Back was not recorded until August 10, 1964, at 3:30 P.M.

Immediately, thereafter United States Machinery Company sold and/or assigned all of its right to the machinery, equipment, vehicles and other assets and the lease thereon to Pasadena Finance Company, the Appellee. The bankrupt became delinquent on his lease payments and subsequently, and on May 26 and 27, 1966 all of the leased assets were repossessed by Pasadena Finance Company.

On June 11, 1965 Jesse Caton filed a voluntary petition in bankruptcy. The trustee brought suit against Pasadena Finance Company on the theory that the sale and leaseback, were conclusively fraudulent as to creditors because the requisite ten days notice was not given before the sale; that therefore Pasadena Finance Company had no valid security interest in the assets, but was simply an unsecured creditor; and that the repossession by them of the assets within four months of bankruptcy constituted nothing more than a preferential transfer voidable pursuant to Section 60 of the Bankruptcy Act.

At the hearing upon the Motion for Summary Judgment, both sides restricted argument to the issue of the ten day notice. Appellant concedes that if the Notice of Intended Transfer and Leaseback was recorded "at least 10 days before the date of transfer and leaseback", then Appellee had a valid security and the dismissal of the complaint was proper.

ARGUMENT.

POINT ONE.

The Notice of Intended Transfer and Lease Back Was Not Recorded at Least 10 Days Before the Date of Transfer and Lease Back.

It is admitted that the Notice was recorded August 10, 1964 at 3:30 o'clock P.M. The sale and leaseback transaction was held August 20, 1964 at 10:00 A.M. Section 3440(h) reads in part as follows:

“Every transfer of personal property and every lien on personal property made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery followed by an actual and continued change of possession of the things transferred, is conclusively presumed fraudulent and void as against the transferor’s creditors while he remains in possession and the successors in interest of those creditors, and as against any person on whom the transferor’s estate devolves in trust for the benefit of others than the transferor and as against purchasers or encumbrances in good faith subsequent to the transfer.”

EXCEPTIONS.

(h) A transfer of personal property if:

- (1) Said personal property is leased back to the transferor immediately following said transfer.
- (2) The transferor (lessee) or the transferee (lessor) records at least 10 days before the date of the transfer and leaseback in the office of the county recorder in the county or counties in which the personal property is situated a notice of the

intended transfer and leaseback which states the name and address of the transferor (lessee) and the transferee (lessor).

This section was added to Section 3440 of the Civil Code in 1959. Appellant has been able to find no California cases interpreting the time requirement of this section. However, it is clear from the similarity in language, and, indeed, almost identical wording of the notice section that the legislature intended to grant to all creditors in a sale and leaseback transaction, the protection afforded to creditors of only a restricted class of debtors under California Civil Code Section 3440.1 otherwise known as the Bulk Sales Act. (Now repealed by Stats. 1965, Ch. 819, pp. 200, 39, 23.)

Section 3440.1 was once embodied in Section 3440, but became a separate section in 1951. The second paragraph of Section 3440.1 declares any bulk sale or transfer by certain types of debtors conclusively fraudulent as to their creditors unless the parties:

(a) Records at least 10 days before the consummation of the sale, transfer, assignment, or mortgage, in the office of the county recorder in the county or counties in which the stock in trade, fixtures, or equipment are situated, a notice of the intended sale, transfer, assignment, or mortgage . . .

However, Section 3440.1 is more detailed and specific than Section 3440(h). The fifth paragraph states:

“The sale shall not occur within 10 days from the recordation of the notice”.

This court has interpreted purpose of the notice provision of Section 3440.1 in *Bumb v. United States*, 276 F. 2d 729, 734 (1960).

The object of the statute is:

(1) to furnish creditors of the intended mortgagor the period of *at least 10 days within which to levy attachment or execution* on the property to be mortgaged and (2) to garnish or levy on the proceeds of the mortgage in the event provision is not made for the payment of the claims presented. (Emphasis added.)

If the 10 day notice requirement is the same for both Sections 3440(h) and 3440.1 of the Civil Code, it is clear in the case at hand that the required 10 day notice was not given. The creditors of the bankrupt here did not have at least 10 days to levy upon the bankrupt's assets. The bankrupt's creditors had only nine days in which to protect themselves.

POINT TWO.

The Ordinary Rule for Computing Time Does Not Apply to Section 3440(h) of the Civil Code of California.

Several statutes state the general rule for computing time.

The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded.

California Civil Code, Section 10.

California Code of Civil Procedure, Section 12.

California Education Code, Section 9.

California Government Code, Section 6800.

Note that the language of those sections refers only to computing the time *within* which an act must be

done. Section 3440(h) requires the expiration of a ten day period, before the act must be done. In other words, the sale and leaseback transaction must take place outside of the ten day period and not within it.

This important distinction was made in the case of *Hutchins v. County Clerk*, 140 Cal. App. 348, 349, 35 P. 2d 563 (1934).

Now there is a difference in law between the meaning of the words "within" and "prior". If you have to do a thing before a certain day that day is not included; in other words, if you have to do a certain thing before the twenty-fourth day of June, June 24th is not included, because it must be before.

It is clear that Civil Code Section 3440.1 did require a different computation of time by the express command;

The sale shall not occur within 10 days from the recordation of the notice.

If the parties had attempted a Bulk Sale instead of a Sale and Leaseback, the sale on August 20, 1964 would have violated Section 3440.1, since under the general rule, August 20, 1964 would be within 10 days of August 10, 1964. There is no reason to believe the legislature intended a different procedure or a different rule should apply to Section 3440(h).

In the recent case of the *City of Pleasanton v. Bryant*, 63 Cal. 2d 643, 47 Cal. Rptr. 807, 408 P. 2d 1351 (1965), the Supreme Court of California construed a statute, very similar to Section 3440(h) to mean a certain period of time had to expire after the filing

of a notice before another notice could be filed. Government Code Section 34302.5 stated in part:

For a period of 90 days after the filing of such notice of intention to incorporate (a) no other notice of intention shall be filed . . .

On January 18, 1963 the first notice was filed. On April 18, 1963 a second notice was filed. The Court held the second notice was filed one day prematurely. In noting that the authorities in California fell into two classes namely: (1) Those dealing with the question of whether a given act was done too late and (2) Those in which the question is whether a given act was done too early, the court stated the rule for computation was the same. However, in the second line of cases, the court used the general rule to compute the time *interval* that had to expire before the act could be done.

By reason of the foregoing Appellant believes the judgment below should be reversed.

Dated Dec. 12, 1966.

Respectfully submitted,

RICHARD M. MONEYSMAKER,
Attorney for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD M. MONEYSMAKER

